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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

ESTHER GOODYEAR,
Petitioner,
v.
THE GATES RUBBER COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Esther Goodyear prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on August 9, 1974, affirming the judgment of the United States District Court for the District of Colorado entered on October 15, 1973.

OPINION BELOW

The judgment and opinion of the District Court for the District of Colorado dismissing the petitioner's complaint is reported at and is printed in Appendix A hereto. The opinion of the Court of Appeals which affirmed the judgment of the District Court is unreported and is printed in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1974. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the District Court had discretion to deny petitioner's motions to maintain the action as a class action without making written findings or otherwise stating its reasons so that the Court of Appeals had no opportunity to ascertain whether the District Court applied the proper criteria.

2. Whether the District Court incorrectly applied the law to the facts of the case when:

a) it ruled that evidence of sexual advances and other improper conduct by a supervisor of petitioner would not be admitted unless the petitioner could establish that such conduct was part of the respondent's official policy or that the respondent participated in such conduct;

b) it concluded that petitioner had not been discriminated against on account of her sex because the jobs for which petitioner was considered and turned down were filled by females, and that a "femininity test" administered to petitioner was not used to her prejudice or to the prejudice of other females.

STATUTES AND FEDERAL RULES INVOLVED

The pertinent provisions of 28 U.S.C. 1343(4), 42 U.S.C. §2000e-2(a), 42 U.S.C. 2000e-5(f)(3), 42 U.S.C. 2000e-5(g) and Rules 23 and 52 of the Federal Rules of Civil Procedure are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner brought this action in the District Court pursuant to the Civil Rights Act of 1964, Title VII, 42 U.S.C. §§2000(e) et seq. and 28 U.S.C. §1343. Petitioner was employed by respondent manufacturing company in its office division from 1960 until April, 1971.

Petitioner alleged that respondent discriminated against her and other female employees in violation of Title VII through certain customs, practices and usages with respect to hiring, promotions, compensation, tenure and other employment conditions. She also alleged in her Second Amended Complaint[1] that respondent fired her in retaliation for the filing of this action.

Petitioner sought to represent a class consisting of all female persons employed by respondent since July 2, 1965, at its general office and factory located in Denver, Colorado. Petitioner's motions to maintain the class action were denied on three different occasions by the Trial Court.[2] At no time did the Trial Court make written findings, and the reasons for the Trial Court's rulings do not appear in the record.

At trial petitioner's evidence showed the following.

Petitioner's educational background consisted of high school and typing and secretarial instruction. Prior to her employment by respondent, she had held jobs as a bookkeeper, bookkeeping machine operator and waitress. During her term of employment with the respondent, the positions she held were classified as clerical, stenographic or secretarial, although petitioner for eight of the ten years of her employment performed market analysis and other work which was not strictly clerical, stenographic or secretarial. During the eight-year period, the majority of petitioner's tasks required expertise and knowledge of the functions of the department in which she was working, the exercise of discretion and judgment, and assumption of responsibility beyond that customarily required of a clerk, stenographer or secretary. The evidence was undisputed that during this eight-year period, which ended in October, 1969, petitioner's work was satisfactory. In October, 1969, in response to a request for promotion, petitioner was transferred to a secretarial position in a different department, which petitioner contends was a demotion in terms of the skills required of her in the new position although there was a small increase in pay. In May, 1970, petitioner was transferred to a stenographer's position in another department of the company with a reduction in pay, where she remained until she was terminated by the respondent in April, 1971, shortly after this action was filed in the District Court.[3] The respondent contended that the petitioner's performance in the last two positions was unsatisfactory and she was terminated for this reason alone.[4]

Jobs in the office division of the respondent were divided into two payroll categories referred to as "exempt" and "non-exempt" from the overtime pay provisions of the Fair Labor Standards Act. Exempt employees were salaried employees and as a group were more highly paid than the non-

exempt employees. Non-exempt employees were paid at an hourly rate.[5] The exempt payroll consisted of 1,044 men and 55 women. The non-exempt payroll consisted of 653 women and 251 men. No woman employee earned a salary in excess of $20,000 a year. In the $10,000 to $20,000 annual income category there were 1,228 men and 28 women. The respondent admitted that most of its managers of departments and divisions have been men and noted that certain secretarial positions had responsibilities comparable to a deputy manager.[6]

Other evidence was that certain employment privileges—use of a gymnasium and membership in a company social club known as The Gates Fire Brigade were available only to men.[7] There was also evidence of a union contract covering employees in the factory which provided for separate male and female job categories and lines of promotion.[8]

The thrust of respondent's evidence was directed toward purportedly negative aspects of petitioner's personality and job performance. The respondent did not present any evidence to explain the disparity in numbers of males and females in high income and low income categories and in the exempt and non-exempt categories. To the contrary, the testimony of the respondent's personnel officers offered by respondent tended to establish that petitioner was locked into the predominately female secretarial or non-exempt category.

When the petitioner was hired by the respondent in 1960, she was given a "femininity test" as a part of a so-called personality profile test administered to all new employees.[9] Although no company purpose was served by the

femininity test,[10] the petitioner's evidence was that her "score" on the femininity test remained in her file throughout most of her employment term and was discussed with her by her supervisor in 1970.[11]

At all times during her employment, the petitioner's job was classified as "non-exempt". The petitioner endeavored to improve her position with respondent by advising her supervisors and the appropriate persons in the company personnel department of her interest in advancement on several occasions. The procedure upon receipt of such a request was for the personnel department to present the applicant's file to supervisors of departments which had an opening for which the applicant was deemed qualified. It is clear from the evidence that petitioner was considered only for transfer or promotion to other secretarial positions, most of which were in the lower paid non-exempt category.[12] The respondent, in determining that petitioner's file would not be considered for anything but clerical, stenographer or secretarial openings, failed to give petitioner credit for her employment experience with the company in which she acquired knowledge and skills beyond that required of a clerk, stenographer or secretary. There was evidence that male employees of the company were not so limited.[13]

The petitioner attempted unsuccessfully to introduce evidence of sexual advances and other improper conduct of a supervisor. The trial court reasoned that the petitioner had to show that such conduct was part of the respondent's official policy.[14]

Since petitioner's personnel file was presented only for secretarial positions or positions in the non-exempt category, the positions for which petitioner was passed over were

generally filled by females. This led the Trial Court to conclude that the petitioner was not passed over for promotion on account of her female sex.[15]

The essence of the petitioner's claim is that the respondent's policies, customs, and practices created an atmosphere of discrimination against females so that once the petitioner was placed in the predominately female-secretarial-non-exempt category of job she was never given the opportunity to apply or be trained for positions outside that category. Petitioner contends that Trial Court's decision therefore incorrectly applied the law to the facts and does not reach the substantial questions which the petitioner raised.

References to the record are designated "R". References to the trial transcript are designated "T".

[1] R. 108
[2] R. 161, R. 266, T. 328
[3] T. 19-87
[4] T. 399-415, T. 631-642, T. 662-667
[5] T. 183
[6] T. 325, R. 269, R. 272-275, R. 520
[7] R. 122-123
[8] T. 325, R. 272
[9] T. 49-54, T. 104
[10] T. 106
[11] T. 207
[12] T. 458-502
[13] T. 59, T. 75, T. 147-154
[14] T. 121, T. 146, T. 195
[15] R. 412

REASONS FOR GRANTING THE WRIT

I. *This petition raises the substantial question of whether a District Court has discretion to deny a motion to maintain a class action without making written findings or otherwise stating its reasons so that the Reviewing Court has no basis to determine whether the District Court applied the proper criteria.*

A. By holding that the District Court acted within its discretion in denying the class action without having an opportunity to review the criteria which the Trial Court applied to arrive at its determination, the Court of Appeals rendered a decision which conflicts with the decisions of other courts of appeals as well as its own prior decisions.

The decision in this case departs from the established rule that the Trial Court acts within its discretion in granting or denying a motion to maintain a class action when there has been a proper appraisal of the relevant factors recited in Rule 23(a) and (b) of the Federal Rules of Civil Procedure. *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555 (2nd Cir., 1968); *Green v. Wolf,* 406 F.2d 291 (2nd Cir., 1968); *City of New York v. International Pipe & Ceramics Corp.,* 410 F.2d 295 (2nd Cir., 1969); *Head v. Timkin Roller Bearing Co.,* 486 F.2d 870 (6th Cir., 1973); *Esplin v. Hirschi,* 402 F.2d 94 (10th Cir., 1968) cert. denied 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459; *Goldstrike Stamp Co. v. Christensen,* 436 F.2d 791 (10th Cir., 1970).

Because the Trial Court made no findings the Reviewing Court had no basis for ascertaining that the Trial Court's decision was arrived at by application of the correct

criteria to the facts of this case. *Gold Strike Company v. Christensen, supra.*

The class action is an especially important and useful tool for vindication of rights under Title VII of the Civil Right Act. *Gerstle v. Continental Airlines,* 50 F.R.D. 213 (D.Colo., 1970). A class action should not be denied without full consideration of the Rule 23 factors and a careful articulation of the reasons for denial. Since failure to apply the criteria of Rule 23 is ground for reversal, 3B Moore's *Federal Practice* §23.50 (2nd Ed. 1969), it cannot seriously be contended that the Trial Court has discretion whether or not to state what criteria, if any, it applied.

The concern of the Appellate Court that petitioner was the only named representative of the asserted class is misplaced. The test of adequate representation of the class is not quantitative, *Green v. Wolf, supra, Eisen v. Carlisle & Jacquelin, supra,* and a class action may be maintained even if only one person has filed a discrimination charge. *Oatis v. Crown Zellerback Corp.,* 398 F.2d 496 (5th Cir., 1968); *Miller v. International Paper Co.,* 408 F.2d 283 (5th Cir., 1969).

B. The Trial Court's abuse of discretion becomes absolutely clear when peititioner's contention that this is a proper case for a class action is measured by the requirements of Rule 23(a) and Rule 23(b)(2).

The class meets the numerosity requirement of Rule 23(a)(1). Petitioner seeks to represent all present and former female employees who have been employed by the respondent since July, 1965. A joinder of all these persons would be impractical and would result in a burden upon the court which Rule 23 was designed to avoid. 3B Moore, *Federal Practice* §23.05 at 23-28 (1970).

There are questions of law or fact common to the class as is required by Rule 23(a)(2). The allegation which applies to all members of the class is that the respondent has denied equal employment opportunity to women. For example, petitioner alleged that respondent:

(1) Segregated women into certain traditional job positions and has not allowed them to transfer and be promoted in the same manner as men;

(2) Subjected women to a separate and segregated lay-off system;

(3) Required women job applicants and employees to submit to tests which have not been validated as successful indications of job performance, in violation of Equal Employment Opportunity Commission Regulation Guidelines, 29 C.F.R. 1607, 35 F.R. 12333 *et. seq.*

(4) Failed to completely remedy the effects of discriminatory types of job classifications and testing procedures.

Such "across-the-board"allegations of employment discrimination are sufficient to meet the requirement of common questions of law or fact of Rule 23(a)(2). *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir., 1969).

Rule 23(a)(2) does not require absolute identity of facts among members of the class. By its express terms, it is satisfied if some common questions exist. *Gerstle v. Continental Airlines, Inc., supra; Johnson v. Georgia Highway Express, Inc., supra.* In this action the situation of discrimi-

nation against women by the respondent is a fact common to all members of the class. While the specific facts of each denial of equal employment opportunity may differ, it is sufficient that as to the totality of issues there is a nucleus of common facts. *Esplin v. Hirschi, supra.*

Petitioner's claims are typical of the claims of the class. Rule 23(a)(3). The typicality requirement has been broadly construed in Title VII cases. *Gerstle v. Continental Airlines, Inc., supra; Johnson v. Georgia Highway Express, Inc., supra; White v. Gates Rubber Co.,* 53 F.R.D. 412 (D.C. Colo., 1971). Here an affidavit submitted by petitioner and testimony elicited at trial showed that other women employed by the respondent were also discriminated against on the basis of sex. In addition, the statistics showed a wide discrepancy in the positions and salaries of male and female employees. The foregoing establishes typicality.

Petitioner fairly and adequately protects the interests of the class as required by Rule 23(a)(4). Petitioner is adequately represented by counsel; she is not involved in a collusive suit, and her interests are not antagonistic to those of the class. *Eisen v. Carlisle & Jacquelin, supra.* The interests of petitioner and other members of the class in eliminating barriers to equal employment opportunity for female employees are identical.

Adequate representation does not necessarily mean that the named plaintiff must prove that she will succeed in her case. *Huff v. N.D. Cass Co. of Alabmaa,* 6 E.P.D. §8800 (5th Cir., 1973); *Hutchings v. United States Industries, Inc.,* 428 F.2d 303 (5th Cir., 1970).

Further, a named plaintiff may also be an adequate

representative of the class even though she is no longer employed by the defendant. *Reyes v. Missouri-Kansas-Texas R.R. Co.*, 53 F.R.D. 293 (D. Kan., 1971); *Johnson v. Georgia Highway Express, Inc., supra.*

Finally, the respondent has acted or refused to act on grounds generally applicable to the class. Rule 23(b)(2). According to the Advisory Committee Note to Rule 23(b)(2), this subdivision is especially appropriate, "in the civil rights field where the party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration".

II. *This petition raises substantial questions regarding the District Court's incorrect application of the law to the facts of the case.*

The Court of Appeals limited its review of the District Court's decision to the "clearly erroneous" Standard of Rule 52(a), Federal Rules of Civil Procedure, and in so doing placed itself in opposition to decisions of other circuit courts and this Court.

When the Trial Court's findings evidence an erroneous view of controlling legal principles, the "clearly erroneous" standary does not limit the Appellate Court in its review of the facts adduced at trial. *Rowe v. General Motors Corporation*, 457 F.2d 348, 356 (5th Cir., 1972).

A. The ruling that evidence of sexual advances and other improper conduct by the petitioner's supervisor would not be admitted unless the petitioner could establish that the conduct was part of the respondent's official policy or that the respondent participated in it was erroneous.

Petitioner's supervisor was respondent's agent. It is elementary that an agent's actions may be imputed to his principal and admitted into evidence in an action against the principal by the third party. McCormick, *Evidence,* §267 (2nd Ed., 1972).

In addition to the general rule that a corporate agent's acts may, under the proper circumstances, be imputed to the corporation, the courts have fashioned a special rule to impute discrimination to the principal in Title VII cases. See, *Tidwell v. The American Oil Co.,* 322 F.Supp. 424 (D. Utah, 1971) in which it was stated that a corporate employer may not hide behind the shield of individual employee action. See also, *Anderson v. Methodist Evangelical Hospital,* 464 F.2d 723 (6th Cir., 1972); *E.E.O.C. Decision* 71-2725, 4 F.E.P. Cases 26 (1971); *Murry v. American Standard, Inc.,* 5 E.P.D. 8523 (ED La., 1973); *E.E.O.C. Decision* 72-1561, 4 F.E.P. Cases 853 (1972) and *Aeronca Mfg. Company v. NLRB,* 385 F.2d 724 (9th Cir., 1967).

B. The District Court's conclusion that petitioner had not been discriminated against on account of her sex because the jobs for which petitioner was considered and turned down were filled by females and that a "femininity test" administered to petitioner was not used to her prejudice or the prejudice of other females indicates that the District Court did not correctly apply the law to the facts of the case.

The District Court failed to take into account the special standard of proof which has been established in cases involving Title VII of 42 U.S.C.

When the petitioner made a *prima facie* showing of the forbidden discrimination, the burden shifted to the re-

spondent to establish that the apparent discriminatory policy, practice, or effect of a policy, is grounded upon a non-discriminatory business necessity. *Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir., 1970); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir., 1972); Marquez v. Omaha District Sales Office, Ford Division of Ford Motor Co., 440 F.2d 1157 (8th Cir., 1971); McDonnell Douglas Corporation v. Green, 411 U.S. 792, 41 LW 4651 (1973).*

Statistical evidence may establish a *prima facie* case that discrimination is a factor in staffing job categories. *Jones v. Lee Way Motor Freight, Inc., supra.*

In the instant case, petitioner established, through the testimony of the respondent's personnel manager, that a great disparity existed between the numbers of males and females in higher paying, more responsible positions and conversely, that the females greatly outnumbered the males in the lower paying, non-salaried, clerical-type positions. Petitioner therefore made her required *prima facie* case. But the personnel manager testified that there was no business necessity or business justification to explain the disparity; in fact the record fails to show any such justification whatsoever. Instead, the respondent founded its defense upon the subjective theory that Mrs. Goodyear was fired because of her "attitude". The respondent did not sustain the burden of proof shifted by plaintiff's establishment of her *prima facie* case.

Since the District Court found that, "The refusal of these department managers was in no way influenced by the fact that the plaintiff was a female and there is no evidence that any of these positions were filled by other than female employees", it is obvious that petitioner's background statis-

tics were not considered in the light of *Jones v. Lee Way Motor Freight, Inc., supra.* The evidence was that most women employed in the office division of respondent are secretaries or clerical workers. Therefore the finding that "these positions were filled by . . . female employees" acknowledges the fact that the petitioner met her burden and that the respondent failed to rebut the *prima facie* case.

Even if the respondent had rebutted the *prima facie* case, the petitioner was entitled to show that the respondent's stated reasons for the failure to promote the petitioner and her ultimate termination were merely pretextual. *McDonnell Douglas Corp. v. Green, supra.* This the petitioner did when she presented evidence of discriminatory policies and practices which predated by several years the time at which the respondent contended the petitioner's job performance was unsatisfactory. The respondent could not use petitioner's conduct as an excuse for perpetuating the discriminatory job classification system which locked the petitioner into a lower-paying predominately female classification. See *Jones v. Lee Way Motor Freight, Inc., supra.*

The courts below also failed to apply the rule of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which this Court specifically disapproved of test procedures (like the "femininity test" given to petitioner) which perpetuate unlawful discrimination and are unrelated to job performance.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO Civil Action No. C-2961

ESTHER GOODYEAR,

Plaintiff,

vs. JUDGMENT OF DISMISSAL

THE GATES RUBBER COMPANY,

Defendant.

PURSUANT TO and in accordance with the Order of Court heretofore entered; it is

ORDERED that this action and the complaint herein are hereby dismissed with prejudice; and it is further

ORDERED that the defendant, above-named, have and recover of the plaintiff, above-named, judgment for its costs to be taxed by the Clerk upon the filing of a Bill of Costs.

DATED at Denver, Colorado, this 15th day of October, 1973.

BY THE COURT:

/s/ HATFIELD CHILSON

HATFIELD CHILSON
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
Civil Action No. C-2961

ESTHER GOODYEAR,
Plaintiff,

vs.

THE GATES RUBBER COMPANY,
Defendant.

Mr. Michael L. Bender, Attorney at Law, 1812 California Street, Room 207, Denver, Colorado 80202, for Plaintiff; Mr. Dayton Denious, Attorney at Law, 2220 First National Bank Building, Denver, Colorado 80202, for Defendant.

CHILSON, Judge.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is an action in which the plaintiff seeks relief pursuant to 42 U.S.C. §2,000e, et seq., commonly referred to as a Title VII Civil Rights action.

In summary, the plaintiff claims she was discriminated against on account of her sex, such discrimination resulting in the following:

1. She was not promoted to a job for which she was qualified.

2. She was demoted;

3. She was required to take a femininity test and on account thereof, she was denied equal employment opportunity.

Additionally, she claims that her employment was terminated in retaliation for instituting proceedings for relief pursuant to Title VII and the filing of this action.

The matter was tried to the Court without a jury, and the Court having heard the evidence and argument of counsel makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The plaintiff is a high school graduate and except for some instruction in typing and secretarial work, she had no further formal education prior to her employment by the defendant.

2. Prior to her employment by the defendant, plaintiff was employed for a period of three years as a waitress, approximately two years as a bookkeeper, and for approximately one year as a bookkeeping machine operator.

3. In 1960, plaintiff applied to defendant for employment and was employed by the defendant in a clerical capacity and she was thereafter continuously employed by defendant until her discharge in April of 1971

From May of 1963, until October, 1969, she was employed in the Industrial Belt Sales Division of the Company as a secretary. Her supervisor was Mr. Stetson, who was later succeeded by Mr. Custer, who continued to be her supervisor until she left that Department in October, 1969.

4. Becoming dissatisfied with the lack of opportunity for advancement in the Industrial Belt Sales Department, in 1969, she requested a transfer to another division. In late 1969, she was offered and accepted a position in the Private Brands Sales Department whose manager was Mr. Kenney. This new position was a promotion in classification and a small increase in pay.

The plaintiff's position with the Private Brand Sales Department had previously been performed by one Maryln Jones, who was promoted, thus creating the vacancy filled by the plaintiff. Maryln Jones was assigned by Mr. Kenney to train the plaintiff in her new position. Although the plaintiff had the technical skills to do the work required, she did not perform the work adequately or satisfactorily.

Mr. Kenney notified the plaintiff that because of her failure to perform her work in a satisfactory manner that it would be necessary for him to dispense with her services effective April 30, 1970, and that she should, in the meantime, locate another position of employment with the company.

Whether her failure to perform was due to lack of proper training by Miss Jones or a lack of interest or a refusal on the part of the plaintiff to accept training, was the subject of conflicting evidence, but there is no evidence that she was replaced because she was a female.

The vacancy created by the termination of the plaintiff's employment with the Private Brands Sales Department was filled by another female who performed the work in a satisfactory manner.

5. The plaintiff's availability for other employment within the company was circulated to other departments, and a few interviews were granted, but none of the departments who had vacancies to be filled equal to the plaintiff's classification were willing to employ her. The refusal of these department managers was in no way influenced by the fact that the plaintiff was a female and there is no evidence that any of these positions were filled by other than female employees.

6. On April 30, 1970, the day on which plaintiff's employment with Mr. Kenney expired, the plaintiff was notified of a vacancy in the MRG Technical Department of which Claude Henderson was the supervisor. The classification of the position was "Steno A" a lower-rated job and one which paid less than the secretarial position which plaintiff held in Mr. Kenney's department. The plaintiff accepted this position and was employed in that position from May 1, 1970, until her termination on April 16, 1971.

7. Shortly after she took this position, the plaintiff evidenced an extreme dislike for and hostility toward Mr. Henderson, the Manager of that department and engaged in a course of conduct which disrupted the operation of the department and the morale of the employees. This conduct included the generation of arguments with fellow employees, sarcastic comments directed to Mr. Henderson and fellow employees, hostile and antagonistic attitudes toward them and a noncooperative attitude in carrying out her duties.

This conduct so affected the efficiency and morale of the department that Mr. Henderson's superior, Mr. Redmond, in August, 1970, required reports from Mr. Hender-

son as to the plaintiff's attitude and activities. Exhibit J contains the notes kept by Mr. Henderson of plaintiff's conduct and these notes were the basis for Mr. Henderson's reports to Mr. Redmond.

On or about November 9, 1970, the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission. In this claim she stated;

> "The company discriminates against women by placing them into lower job classifications, by denying them promotional opportunities in a similar manner as those opportunities offered to male employees, and by imposing different terms, conditions and privileges of employment. I have been recently demoted and have not been given job advancement opportunities because I am female."

Thereafter, the plaintiff received from the Commission a notice of her right to bring suit in the United States District Court and this action was instituted accordingly on March 10, 1971

At the time Mr. Redmond arrived at his decision to terminate the plaintiff's employment, neither he nor Mr. Henderson were aware of the fact that the plaintiff had filed charges with the Equal Employment Opportunity Commission and Mr. Redmond's decision to terminate the plaintiff was made prior to the filing of this action.

The Court finds that the decision to terminate plaintiff's employment was not, either in whole or in part, in retaliation for the plaintiff's filing charges with the Commission and the institution of this action.

8. The evidence fails to show any occasion when the company had an operning for employment in a position for which plaintiff was qualified and which was a better position than that held by her and which the company denied to her because she was female.

9. Plaintiff testified to a number of matters such as work breaks, with respect to which she alleged she had been treated unfairly. In most instances, her testimony did not fix the dates when the alleged wrongs occurred and in all such cases, her claim was only that she as an individual had not been treated fairly and not that she had been so treated because she was a female.

10. Plaintiff complained of a psychological test administered to her in 1960 which purported to measure a number of qualities including "femininity". There is no evidence that this test was used to the prejudice of females as a class or that it ever operated to the prejudice of plaintiff.

11. The evidence does not sustain any claim upon which the plaintiff is entitled to relief.

12. There was introduced into evidence proceedings before the Industrial Commission of the State of Colorado adjudicating a claim of the plaintiff after her discharge for unemployment compensation benefits. These proceedings were offered by the defendant on the theory that the findings of the Commission of the reasons why the plaintiff was discharged by the defendant are binding on this Court in this proceeding. The tender for this purpose is refused and this Court determines that the findings of the Industrial Commission in this respect are not binding on this Court and are not proper evidence to be considered by this Court. The Court

therefore has arrived at its Findings of Fact from evidence other than the findings of the Industrial Commission and these findings have been entirely disregarded by the Court.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact, the Court concludes as matters of law;

1. That the plaintiff was not denied promotion or demoted or terminated as an employee of the defendant because of discrimination against her on account of her sex;

2. That the plaintiff was not terminated from her employment with the defendant in retaliation for the filing of charges with the Equal Employment Opportunity Commission or because of the institution of this suit.

3. That final judgment of dismissal of this action with prejudice should be forthwith entered.

IT IS THEREFORE ordered that final judgment of dismissal of this action with prejudice shall forthwith enter.

Entered this 15th day of October, 1973.

BY THE COURT:

/s/ Hatfield Chilson
United States District Judge

Aug 9 1974
Howard K. Phillips
Clerk, United State
Court of Appeals
Tenth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 73-1973

Appeal from the United
States District Court
for the District of
Colorado (D.C.No.C-2961)

ESTHER GOODYEAR,
Plaintiff-Appellant,
vs.
THE GATES RUBBER
COMPANY,
Defendant-Appellee.

Before PICKETT, Senior Circuit Judge, and SETH and McWILLIAMS, Circuit Judges

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PER CURIAM

Mrs. Esther Goodyear appeals from an order of the United States District Court for the District of Colorado dismissing her sex discrimination suit against Gates Rubber

Company, in which she alleged a violation of the Civil Rights Act of 1964, Title VII, 42 U.S.C. §§2000(e) *et seq.* Following a five day trial without a jury, the District Court held that appellant was not denied promotion in employment, or demoted or terminated because of sex discrimination; and that she had not been terminated in retaliation for the filing of charges with the Equal Employment Opportunity Commission or because of the institution of the instant suit. We affirm.

Appellant asserts four questions on appeal: 1) did the District Court err in denying appellant's motion to proceed on behalf of a class; 2) did the District Court erroneously exclude evidence concerning appellant's relationship with her immediate supervisor; 3) did the District Court improperly apply the "clearly erroneous" standard of review; 4) did the District Court fail to consider evidence of continuing discrimination.

The first issue is whether the District Court abused its discretion in denying class action treatment. A motion for a class action is within the discretion of the Trial Court, and will not be overturned absent a clear abuse of discretion. *Goldstrike Stamp Company v. Christensen,* 436 F.2d 791 (10th Cir. 1970). The motion was not made until one year after institution of the suit and Mrs. Goodyear was the only named representative of the asserted class. A single affidavit of one former female employee at Gates was submitted to substantiate the class. By the time of trial, four attorneys had entered and withdrawn from this case, and there was an unusual amount of difficulty in framing the issues for this case. The District Court considered and denied the motion for a class action on three separate occasions, and expressly reserved the possibility of reopening the issue if the evidence at trial so warranted. Despite the lack of written

findings, we think the District Court acted well within its discretion in denying the class action.

The second issue is not properly before this Court on appeal, since it was specifically stricken from the complaint in the Pre-Trial Order. The District Court was very lenient in allowing evidence to be heard on the relationship between Mrs. Goodyear and her immediate supervisor, and appellant never made a satisfactory showing of materiality of the evidence sought to be introduced. We find no error in the court's exclusion of the evidence.

The third issue on the standard of review is the major question on appeal. We will first consider appellant's contentions reqarding the statistical evidence presented to the District Court. This evidence established that a very small percentage of appellee's higher level employment positions are occupied by women. The relevancy of such statistical evidence to civil rights actions is clear, and such evidence is frequently sufficient to establish a *prima facie* case of discrimination. *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir.1972); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), cert. denied 401 U.S. 954. Once a *prima facie* case of discrimination is established, the burden shifts to the employer to rebut the discrimination charges. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Our review of tbe record discloses nothing to suggest that the District Court failed to properly consider all evidence received. In addition to evidence of a statistical imbalance between male and female employees of appellee, the District Court heard testimony in explanation of the imbalance. Additional testimony tended to rebut charges that retaliatory action was taken against appellant.

We find no evidence that the law was incorrectly applied to the facts in this case and consequently the District Court's findings are to be reviewed in this appeal in liqht of the clearly erroneous standard. *Sarah Taylor v. Honeywell, Inc.*, ____ F.2d ____ (10th Cir., filed June 7, 1974); *Spurlock, supra.* Our review of the voluminous records and files in this case does not leave us with the impression that the District Court's findings are clearly erroneous. To the contrary, we think the evidence contained in the record amply supports the District Court's findings.

The fourth issue on appeal is not strongly urged, and we need only say that appellant admits that the District Court did permit testimony bearing on the present effects of past discrimination, *Jones, supra,* and did not strictly construe against the appellant the 210-day Title VII limitation on grievances.

Upon docketing, the parties were notified that we were considering summary affirmance and of their respective rights to support or oppose such action. In response thereto each of the parties submitted memoranda supporting their respective positions. Nevertheless, a careful and thorough review of the records and files in this case (including the trial transcript) convinces us that the judgment of the District Court is correct.

Affirmed.

APPENDIX C

42 U.S.C. 1343 (4):

1343. Civil rights and elective franchise.—The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. 2000e-2(a):

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-5(f)(3):

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [USCS §§2000e-2000e-17]. Such an action may be

brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code [28USCS §§1404, 1406], the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

42 U.S.C. 2000e-5(g):

(g) Injunctions—Affirmative action—Equitable relief. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the

admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS §42000e-3(a)].

Rule 23(a), Federal Rules of Civil Procedure:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3), Federal Rules of Civil Procedure:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or

defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

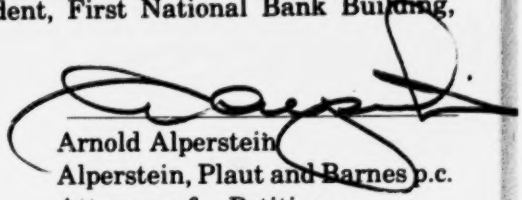
Rule 52(a), Federal Rules of Civil Procedure:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

CERTIFICATE OF SERVICE

I, Arnold Alperstein, one of the attorneys for Esther Goodyear, petitioner herein, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 5th/14th days of November, 1974, I served three copies of

the foregoing Petition for Writ of Certiorari on the respondent by mailing three copies in a duly addressed envelope, with first class postage prepaid, to Dayton Denious, attorney of record for respondent, First National Bank Building, Denver, Colorado.



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